No. 91-542

In The

Supreme Court of the United States

October Term, 1991

ELLIS B. WRIGHT, JR., WARDEN, et al.,

Petitioners,

v.

FRANK ROBERT WEST, JR.,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

I

CONGRESS HAS NOT MANDATED *DE NOVO* FEDERAL COLLATERAL REVIEW OF STATE PRISONERS' CONSTITUTIONAL CLAIMS.

The argument of the respondent and his *amici* that 28 U.S.C. § 2254 evidences an intent by Congress that a federal habeas corpus court conduct *de novo* review of state prisoners' constitutional claims finds no support in the language of the statute. While it is clear that the statute grants federal courts the authority to "entertain" such claims, *see* § 2254(a), and provides that federal review of state court findings of fact is governed by a presumption of correctness, *see* § 2254(d), the statute is totally silent with respect to the *type* of review required when a federal habeas court reviews a state court's legal conclusions. *See Brown v. Allen*, 344 U.S. 443, 462 (1953) ("in enacting . . . § 2254, . . . Congress made no reference to the power of a federal district court over federal habeas corpus for claimed wrongs previously passed upon by state courts"). Instead, 28 U.S.C. § 2243 merely provides that the federal court "shall . . . dispose of the matter as law and justice require."[1] *See Brown*, 344 U.S. at 462 ("This has long been the law").

This Court, however, has made it abundantly clear that Congress has *not* mandated *de novo* collateral review. Despite the fact that the language of § 2254(a) makes no

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[1] Indeed, the American Bar Association admits that Congress has not "expressly" mandated *de novo* review. (See ABA *Amicus* Brief at 10).

distinction among the types of constitutional claims that a federal court "shall entertain," this Court has ruled repeatedly that there are many instances where a state prisoner has no right to *de novo* review. For instance, the procedural default cases from *Wainwright v. Sykes*, 433 U.S. 72 (1977), to *Coleman v. Thompson*, 111 S.Ct. 2546 (1991), demonstrate that, when a state prisoner's constitutional claim has been barred by a state's procedural rule, *no* federal review of the claim is required unless he can show both "cause" and "prejudice" for his default.[2]

Similarly, *Stone v. Powell*, 428 U.S. 465 (1976), demonstrates that, even when a constitutional claim has been properly preserved, the scope of federal habeas review can be as minimal as the "full and fair opportunity" inquiry that *Stone* established for Fourth Amendment claims. Indeed, *Stone* explicitly noted that it has been *this Court* that has traditionally defined the scope of the writ, 428 U.S. at 475-482, and *Stone* necessarily rejected the

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[2] West contends that the procedural default cases "never altered the statutory independent review requirement" and represent merely an example of this Court's exercising "its authority to determine prisoner entitlement to *any* federal habeas review." (Resp. Br. 44; emphasis in original, footnote omitted). If this were true, however, one might reasonably ask how this Court could have the authority to deny a state prisoner *any* federal collateral review if the statute does not make an exception for defaulted claims and the congressional mandate for *de novo* review is as clear as West contends. *See Kuhlmann v. Wilson*, 477 U.S. 436, 448 n.8 (1986) (the procedural default cases "plainly concern the 'general scope of the writ' ").

view of the dissent that the majority opinion was contrary to the intent of Congress. *See id.* at 502-536 (Brennan, J., dissenting). In fact, West's argument that § 2254(d)'s requirement of deferential review for state factual findings represented Congress' ratification of *de novo* review for legal questions (Resp. Br. 34-37) is *the very same argument unsuccessfully asserted by the Stone dissent, id.* at 528, and later by the dissent in *Butler v. McKellar*, 110 S.Ct. 1212, 1225 n.10 (1990) (Brennan, J., dissenting). *See also Patterson v. McLean Credit Union*, 491 U.S. 164, 175 n.1 (1989) ("It is 'impossible to assert with any degree of assurance that congressional failure to act represents' affirmative congressional approval of the Court's statutory interpretation") (citation omitted).

Likewise, *Teague v. Lane*, 489 U.S. 288 (1989), and its progeny settled beyond any dispute that *de novo* federal collateral review is not mandated by § 2254. The whole point of those cases is that the purpose of the writ does not require subjecting a state court's reasonable good faith decision to *de novo* review by a federal habeas court. *See Teague*, 489 U.S. at 306; *Butler*, 110 S.Ct. at 1216-1217; *Saffle v. Parks*, 110 S.Ct. 1257, 1260 (1990); *Sawyer v. Smith*, 110 S.Ct. 2822, 2827 (1990). These decisions necessarily rejected the respective dissenting opinions that Congress had mandated *de novo* federal collateral review of state prisoners' constitutional claims. *See, e.g., Teague*, 489 U.S. at 327 (Brennan, J., dissenting); *Butler*, 110 S.Ct. at 1218-1219, 1224-1226, n.12 (Brennan, J., dissenting) ("Congress thus entitled prisoners to *de novo* review of their

federal claims in federal habeas proceedings");[3] *Sawyer*, 110 S.Ct. at 2841 (Marshall, J., dissenting).

Thus, while it is clear that Congress has defined the scope of the writ with respect to reviewing state court findings of fact, *see* § 2254(d), this Court's cases make it equally clear that it has been this Court, *not* Congress, that has defined the scope of the writ with respect to the review of legal questions. Indeed, both *Teague* and *Butler* unequivocally embrace the concept that this Court is "responsible for defining the scope of the writ. . . . " *See Butler*, 110 S.Ct. at 1216, *quoting Teague*, 489 U.S. at 306. *See also Kuhlmann v. Wilson*, 477 U.S. 436, 447-448 (1986) ("The Court has performed its statutory task through a sensitive weighing of the interests implicated . . . "); *Rose v. Lundy*, 455 U.S. 509, 548 n.18 (1982) (Stevens, J., dissenting) (the Court's limiting federal habeas review to a

[3] Neither the respondent nor any of his *amici* comes to grips with the fact that in *Butler* the four dissenting Justices, including two Members of the present Court, expressly agreed that the effect of *Butler* was to end *de novo* federal collateral review of state prisoners' constitutional claims. *See* 110 S.Ct. at 1226 n.12 (Brennan, Marshall, Blackmun and Stevens, JJ., dissenting) ("The Court's decision today to limit *de novo* federal review of alleged constitutional defects in a state criminal proceeding to direct review by this Court . . . thwarts Congress' intent to provide for effective federal review of such state proceedings . . . "). Even commentators who disagree with this Court's decisions in *Teague* and its progeny are forthright enough to concede the impact of those cases on *de novo* review. *See, e.g.*, Patchel, *The New Habeas*, 42 Hast.L.J. 941, 1000 (1991) (*Butler* "replaces the federal habeas court's de novo consideration of issues of constitutional law recognized in *Brown [v. Allen]* with what amounts to a 'clearly erroneous' standard of review . . . ").

relatively small group of "fundamental" claims would be "consistent with the intent of Congress that enacted § 2254 in 1948").

In his concurring opinion in *Teague*, Justice White stated, "If we are wrong in construing the reach of the habeas corpus statutes, Congress can of course correct us." 489 U.S. at 317 (White, J., concurring). If, as respondent and his *amici* argue, Congress truly had mandated *de novo* federal collateral review of state prisoners' constitutional claims, then surely Congress would have acted clearly and decisively to "correct" this Court's decisions in *Sykes*, *Stone*, and the *Teague* line of cases. The fact that Congress has *not* done so certainly does not support West's argument.

Finally, the contention that recent "actions" of the Congress evidence a legislative intent to mandate *de novo* collateral review is singularly illogical. (See, for example, New York *Amicus* Brief at 8-9). Whatever "actions" individual Houses or a conference committee may have taken in the name of habeas corpus reform, the undeniable fact is that Congress, as an institution, has failed to pass *any* legislation altering the language of § 2254 or otherwise mandating *de novo* review of state prisoners' constitutional claims. *See Patterson*, 491 U.S. at 175 n.1 ("Congress may legislate . . . only through the passage of a bill which is approved by both Houses and signed by the President"). Moreover, the legislation approved by the Senate-House conference committee contains no provisions that can even arguably be described as requiring *de novo* review. In fact, § 2256 of the proposed legislation provides that a federal habeas court "shall not apply a new rule" – hardly a congressional mandate for *de novo*

review. *See* Conference Report to accompany HR3371, 137 Cong. Rec. H11686-11744 (daily ed. Nov. 26, 1991).

II

WEST'S CONTENTION THAT *TEAGUE/BUTLER* "REASONABLENESS" REVIEW DOES NOT APPLY TO CASES INVOLVING THE APPLICATION OF SETTLED LAW IS FORECLOSED BY *STRINGER V. BLACK*.

Respondent contends that *Teague* and its progeny merely prohibit a federal habeas court "from applying new legal principles developed after the state court conviction became final" and are essentially irrelevant when the case involves applying settled law. (Resp. Br. 48). This argument is demonstrably wrong.

In *Stringer v. Black*, 112 S.Ct. ___, slip op. 4 (Mar. 9, 1992), this Court recently held:

> The interests of finality, predictability, and comity underlying our new rule jurisprudence may be undermined to an equal degree by the invocation of a rule that was not dictated by precedent *as by the application of an old rule in a manner that was not dictated by precedent*. [Emphasis added].

And, while the Court held that Stringer's particular constitutional claim was not barred from federal habeas review, it did so only because "there was no arguable basis" upon which the state court could have rejected the claim at the time his conviction became final. *Id.*, slip op. 8. The result in *Stringer*, moreover, refutes the suggestion

of West and his *amici* that applying the "reasonableness" standard is tantamount to no federal review at all.[4]

West claims that he is not seeking the benefit of a "new rule." He simply cannot deny, however, that he is seeking "the application of an old rule," *i.e.*, the rule of *Jackson v. Virginia*, 443 U.S. 307 (1979), "in a manner that was not dictated by precedent." *See Stringer*, slip op. 4. A claim is "dictated by precedent" only if no reasonable

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[4] Refusing to apply the "reasonableness" standard to so-called "mixed" questions of law and fact would force the federal courts into a regime of line-drawing designed to discern the "difference" between "pure law" and "mixed" questions. Such a regime inevitably would lead to the type of obtuse analysis recently engaged in by the United States Court of Appeals for the Seventh Circuit:

> [W]e adopt the following analysis when deciding whether a case announces a new rule under *Teague*. First, we determine whether the case clearly falls in one category or another – if it overrules or significantly departs from precedent, or decides a question previously reserved, it is a new rule, *while if it applies a prior decision almost directly on point to a closely analogous set of facts, it is not. Second, when the question is a close one*, we will look to (1) whether the case at issue departs from previous rulings by lower courts or state courts, and (2) the level of generality of prior precedent in light of the factual context in which that precedent arose.

Taylor v. Gilmore, ___ F.2d ___, ___, 1992 WL 6955 (7th Cir., Jan. 21, 1992) (emphasis added). As *Taylor* demonstrates, maintaining and monitoring a distinction between "pure law" and "mixed" questions will render the task of the lower federal courts even more difficult than it already is. The *Teague/Butler* "reasonableness" standard, on the other hand, is straightforward and easy to apply.

court could have rejected it. *See Sawyer*, 110 S.Ct. at 2827. No one can seriously argue that no reasonable court could have rejected West's sufficiency-of-the-evidence claim at the time his conviction became final. Indeed, even today, it is impossible to conclude that the Constitution *compels* an acquittal where, as here, the state proves that a person charged with larceny was found in recent, exclusive possession of the stolen goods and the jury determines that his explanation for his possession is a lie.

CONCLUSION

The tactic of West and his *amici* has been to ignore the meaning of *Teague* and its progeny with respect to the scope of federal habeas corpus and the lack of a legislative mandate for *de novo* federal collateral review. Instead, they have attempted to paint a "doomsday" scenario that wrongly equates a reasonable good faith judgment by a state court with a denial of a state prisoner's constitutional rights. This Court, however, should make clear once and for all that the granting of federal habeas relief where the state court acted reasonably and in good faith constitutes a trivialization of the writ that cannot be countenanced: "The writ has no enemies so deadly as

those who sanction the abuse of it, whatever their intent." *Brown v. Allen*, 344 U.S. at 544 (Jackson, J., dissenting).

Respectfully submitted,

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March, 1992

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